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Supreme Court United States.

OCTOBER TERM, 1877.

No. 633.

ALEX. A. THOMPSON,
Plaintiff in Error,

vs.

BENJAMIN F. BUTLER,
Defendant in Error.

In Error to the Circuit Court for the District of Massachusetts.

Brief of Plaintiff in Error, in Opposition to Motion to Dismiss Writ of Error.

J. HUBLEY ASHTON,
JAMES THOMSON,
Of Counsel.

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Supreme Court of the United States.

No. 633.

OCTOBER TERM, 1877.

ALEX. A. THOMPSON, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. BUTLER, DEFENDANT IN ERROR.

ON MOTION TO DISMISS.

BRIEF OF PLAINTIFF IN ERROR, IN OPPOSITION TO MOTION.

STATEMENT.

This was an action by Benjamin F. Butler, (defendant in error,) against Alex. A. Thompson, (plaintiff in eroror,) originally instituted in the Superior Court of Massachusetts, and removed thence into the Circuit Court of the United States, to recover damages for not accepting certain iron, alleged to have been sold by plaintiff to defendant.

The plaintiff claimed in his declaration the difference between the alleged contract price of the iron, and the price realized on the resale, amounting, as alleged, to $6,419.34, paper currency of the United States, and costs of resale, in all, $6,581.11 currency, with interest from November 16, 1867; and laid his damages at $10,000.

On June 16, 1876, the jury found a verdict for the plaintiff, and assessed his damages at the sum of $5,066.17, in *gold*.

The record of the verdict is as follows:

"Issue being thus joined, the cause after full hearing was, to wit, June 15, 1876, committed to a jury who, after hearing all matters and things concerning the same, returned their verdict thereon, and upon oath said: the jury find for the plaintiff, and assess damages in the sum of *five thousand and sixty-six dollars and seventeen cents, in gold.*"

On June 26, 1876, the plaintiff filed the following motion:

"*Motion to modify verdict.*

And now comes the plaintiff, and remits the amount of the verdict rendered by the jury in his favor, in excess of five thousand dollars, and prays the court to render judgment for the plaintiff for said sum of five thousand dollars in *coin*, and no more, with costs.

By L. S. DABNEY,
His Attorney."

On the same day, June 26, 1876, defendant filed his objection to this motion, as follows:

"*Objection to Modification of Verdict.*

"The defendant comes, and objects to the allowance of the foregoing motion, and prays that his objection may be noted.

"CODMAN & JOHNSON,
"*For Defendant.*"

On the same day, June 26, 1876, the Court entered an order, that "the said motion to modify verdict be allowed after the bill of exceptions in this cause is settled."

The bill of exceptions was signed and sealed by the Circuit Judge, as of June 16, 1876, before the jury left the bar.

On the 13th of November, 1876, the Court entered judgment, as follows:

"And now, to wit, November 13, 1876, it is considered by the Court, that the said Benjamin F. Butler, plaintiff, recover of the said Alex. A. Thompson, defendant, the sum of *five thousand dollars in coin*, damages, and his costs of suit taxed at , in accordance with the plaintiff's motion to modify verdict, allowed by this Court as aforesaid."

It will be thus perceived, that while the verdict of the jury was for $5,066.17 gold, the Court below, on motion of the plaintiff, and against the objection of the defendant, afterwards entered a judgment for a less amount, to wit, $5,000 in coin, and that this action was had after the rulings and instructions of the Court on the trial, alleged by defendant to be erroneous, had been duly made a part of the record now before this Court on the present writ of error.

This court is now moved by defendant in error to dismiss this writ, on the ground that the matter in dispute does not exceed "the sum or value of five thousand dollars."

Argument.

First.

Conceding, for the present, that, in this case, the "sum or value" in controversy is to be determined, so far as the plaintiff in error is concerned, by the amount of the judgment as actually entered by the court, it is, nevertheless, contended, on the part of the plaintiff in error, that the judgment being for the recovery of five thousand *coined* (gold) dollars of the United States, is a judgment for a "sum or value" greater than five thousand "dollars," according to the just import and meaning of the term "dollars," as used in the 2d section of the act of February 16, 1875.

1. This court, in the celebrated cases of *Bronson* v. *Rodes*, and *Butler* v. *Horwitz*, (7 Wall., 229, 258,) took judicial notice not only of the fact that coined dollars were of greater value than paper dollars, but also of the *actual value* of

coined dollars in the market at the time of the decisions. (See Opinion of Chase, C. J., 7 Wall., 245, 250, 251, 252.)

The right of the court to recognize the fact that gold dollars were worth more than paper dollars at the date of this judgment cannot be doubted.

By this judgment for $5,000 in coin, the plaintiff in error was held liable by the court below for more than five thousand "dollars," as damages for breach of the contract upon which the suit was instituted.

The judgment thus directly recognized an existing difference in value between paper dollars and the coined dollars, and affirmed that the plaintiff in error was liable to pay damages in the latter description of dollars.

A judgment for five thousand "dollars" would have called for the payment only of $5,000 in treasury notes.

It is to be inferred, from the fact that a judgment was rendered for five thousand coined dollars, that the court below held, that the defendant in error was entitled to recover *more* than $5,000 in treasury notes. It is easy to perceive that the very question of the right of this defendant to recover damages in coin, or more than $5,000 in legal tender notes, may be one of the questions that arise upon this writ of error. The plaintiff in error cannot be debarred of his right to have this question decided, by the fact that there is a judgment against him for gold.

If the judgment below in this case had been for *five thousand and one* "dollars," this court would have had undoubted jurisdiction to review it.

It would be very extraordinary if a judgment in realty for *five thousand four hundred and eighty-seven* "dollars," should be held not to be within the jurisdiction of this court, because expressed in *coined* dollars, instead of the actual number of "dollars" it represents.

Translating this judgment into its equivalent in note dollars, it is a judgment for five thousand four hundred and eighty-seven "dollars,"* and is thus plainly subject to the jurisdiction of this court.

* We have affidavits to prove, if the court think it necessary, that gold was worth 109¾ at date of the judgment.

2. Considering the question upon the construction of the act of 1875, as to the description of legal "dollars," in which the "sum or value" of the matter in dispute is to be estimated, according to the just intent of the statute, it is obvious, and requires no argument to prove, in the *first* place, that, inasmuch as the law recognizes two descriptions of dollars, which differ in actual value, the statute must be held to refer to *one* or *other* of these "*dollars*" as a uniform standard of value for determining in *all* cases the amount in controversy, with reference to the jurisdiction of this court.

When the statute says, that to give the jurisdiction, the matter in dispute must exceed the "*sum* or *value* of five thousand 'dollars,'" the question recurs—*which* "dollars"?

The "dollars" referred to must be either the dollars of least value (paper dollars) or the dollars of most value (coined dollars). There cannot be two jurisdictional standards of value.

It is not supposable that the jurisdiction was intended to be given, as well where the amount in controversy *exceeds* five thousand paper dollars, but is *less* than five thousand *coined* dollars, as where that amount exceeds five thousand coined dollars.

If the *coined* "dollars" are the standard, then no writ is given where the amount in controversy exceeds five thousand *paper* dollars, but is *less* than five thousand *coined* dollars.

If the writ lies where the amount in controversy is more than five thousand *paper* dollars, but less than five thousand *coined* dollars, it is simply because *paper* "dollars' are the description of "dollars" contemplated by the statute.

If a writ of error lies in cases where the "sum or value" in controversy is greater than five thousand paper dollars, but less than five thousand coined dollars, it must lie where the "sum or value" of the matter in dispute is five thousand coined dollars, for they are a greater sum, as well as a greater "value," than five thousand paper dollars.

3. It is equally obvious, in the *second* place, as matter of

law, that the act of 1875 must be construed as referring to the legal dollar of least value, *i. e.*, the treasury-note dollar; for where a contract or judgment calls for the payment of "dollars" generally, it means the legal dollars of least value, *because the debtor has the legal option to pay in such dollars of least value;* and when the statute speaks of "dollars," it, of course, refers to the description of "dollars" contemplated by contracts or judgments payable generally in "dollars;" that is to say, to the treasury note or paper dollars.

As matter of construction, a contract to pay "dollars," is to be interpreted as a contract to pay treasury-note dollars as the dollars of the least value, because this was the understanding of the parties, and the debtor cannot be required to pay any greater amount in different dollars.

This principle of construction was, in fact, affirmed by this court in *Bronson* v. *Rodes*, and *Butler* v. *Horwitz*, (7 Wall., 254.) The same rule applies in the construction of the statute of 1875.

The word "dollars," in that statute, must be construed as referring to the same kind of "dollars" contemplated by contracts, as well as by judgments, made payable generally in "dollars," and to no other description of "dollars."

We suppose it to be a universal rule of construction, that where a contract, judgment, or statute refers generally to "dollars," without further specification, it must be interpreted as having reference to the dollars of least value which are a legal tender in payment of debts.

4. But *further:* the act of 1875 gives the jurisdiction, where "the matter in dispute exceeds the sum *or* VALUE of five thousand dollars."

Independently of the view just presented, it is clear that the case is brought within the jurisdiction by the "*value*" of the matter in dispute.

In *Bronson* v. *Rodes*, and *Butler* v. *Horwitz*, (7 Wall., 250, 260,) the Court say, that a contract to pay a certain sum in gold coin is, in substance and legal effect, a contract

to deliver a certain weight of gold of a certain fineness, to be ascertained by count, and is not distinguishable, in principle, from a contract to deliver an equal weight of *bullion* of equal fineness.

The language of the Chief Justice, upon that subject, is as follows:

"Payment of money is delivery, by the debtor to the creditor, of the amount due. A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else that an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. *It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of* BULLION *of equal fineness.* It is distinguishable, in circumstances, only, by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of *bullion*, by assay and the scales, while, in the case of *coin*, it may be ascertained by count."

A *judgment* for the payment of a certain sum in gold coin is subject to a like analysis; and, in legal import, it is not distinguishable from a judgment for the recovery of an equal weight of gold bullion of equal fineness.

It will not be denied that a judgment for the recovery of a quantity of gold bullion would be subject to review here if it was made to appear by the record or by affidavits, filed in this court, that the value exceeded $5,000 in legal tender notes, although less than $5,000 in coin. In such a case nobody would claim that to authorize a writ of error the value must exceed 5,000 *coined* dollars. Nor would it be contended that the court was ousted of its jurisdiction, if it appeared that the value of the bullion was *exactly* 5,000 coined dollars.

This then, in legal effect, is a judgment for the recovery, by plaintiff below, of a certain weight of standard gold of a certain purity, which had a definite and ascertainable "value" in the market of the country; and that judgment the court has jurisdiction to review if the market "value" exceeded $5,000 in legal tender notes, precisely as in the

case of a judgment for an equal weight of bullion of equal fineness.

If the judgment were for an equal weight of bullion, of equal purity, and the value were not disclosed by the record, affidavits would be admissible to establish the market value at the time of the judgment. (*Ex parte* Bradstreet, 7 Pet., 634; The Grace Girdle, 6 Wall., 441.)

But, in the case of this judgment, affidavits of value are not necessary, as the matter in dispute relates to 5,000 coins, of the denomination of dollars of the coinage of the United States, each of which the Court is judicially aware was worth more, when the judgment was rendered, than a dollar in the form of a United States treasury note.

The gold for which judgment was rendered, the Court, therefore, knows was worth, in the market, *more* than $5,000 in legal tender currency; and this is all that is necessary to maintain the jurisdiction of this tribunal to revise the judgment.

It is not important that the Court should be informed of the precise value of gold coin, at the date of the judgment, or writ of error, though we have affidavits to prove that value if necessary.

5. Again, it is to be observed, that questions as to the measure of damages in this case, and the description of lawful money in which the damages should be assessed, may possibly enter into the determination of the case upon this writ of error.

The judgment may be reversible upon the very ground that the damages were legally assessable, under the contract, in *legal tender notes*, and that the plaintiff below was entitled *only* to a judgment for the amount of his damages in that currency.

Suppose the present judgment should be reversed upon the ground that the contract did not authorize the assessment of damages in gold coin, and upon a new trial, verdict and judgment should be rendered in greenbacks for an amount somewhat greater than five thousand "dollars,"

there can be no doubt that the defendant would be entitled to a writ of error for the revision of *that* judgment.

It would be a singular result if the existing judgment, which is for an amount much larger than five thousand "dollars," should be held not subject to the jurisdiction of the Court.

6. In conclusion, upon this branch of the case, we observe that, while it is undoubtedly true that the Supreme Court, under the Constitution, takes its appellate jurisdiction over cases, "with such exceptions and under such regulations as the Congress shall make," a statute excepting, by implication, cases within the judicial power of the United States from the jurisdiction of the Supreme Court, is subject to a *strict* construction. Reasonable doubts should be resolved in favor of the jurisdiction. If the language of the statute is susceptible of two constructions, that construction must be adopted which recognizes and admits the jurisdiction of the Court.

We understand this principle to be affirmed as a rule of construction by Chief Justice Marshall, in the leading case of *Durousseau* v. *United States*, (6 Cranch, 314.)

"The appellate powers of this Court." he said, "are not given by the Judicial Act. *They are given by the Constitution.* But they are limited and regulated by the judicial Act, and by such other acts as have been passed on the subject. * * * Thus a writ of error lies to the judgment of a Circuit Court, where the matter in controversy exceeds the value of two thousand dollars. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the Court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the Circuits where the matter in controversy is of less value, and implies negative words.

This restriction, however, being *implied* by the court, and that implication being founded on the manifest intent of the Legislature, can be made *only* where that *manifest* intent appears."

The doctrine of Chief Justice Marshall, in effect, plainly is, that a statute limiting the jurisdiction of this court to cases where the matter in controversy exceeds a certain amount, is a statute which should be construed *strictly;* and unless a manifest intent appears to except particular cases, they should be held to be within the jurisdiction ; and this upon the ground, that the appellate powers of the court are not given by Congress, but by the Constitution.

Second.

If, however, it should be held, contrary to the foregoing argument, that the judgment, as actually entered by the court below, is not for a "sum or value" greater than 5,000 "dollars," within the meaning of the act of Congress, we nevertheless contend that the jurisdiction of this court, in the present case, cannot properly or justly be made to depend upon, or allowed to be determined by, the amount of that judgment, and that, as the *verdict* of the jury was for $5,066.17 in gold, the court has jurisdiction to review the judgment entered by the court.

1. There is nothing in the act of 1875 which requires, in order that a judgment of a Circuit Court may be re-examined in this court, that the *judgment* should "exceed the sum or value of $5,000, exclusive of costs."

The provision of the act is, that, in order that a judgment of the Circuit Court may be re-examined, "the *matter in dispute* shall exceed the sum or value of five thousand dollars, exclusive of costs."

The *verdict* ascertains and fixes the sum or value of the matter in dispute. It is, in substance, the thing in dispute between the parties.

The errors of law, on the part of the court below, on the trial, produced the verdict, and the object of the writ of error is to correct those errors, and obtain a judgment of reversal, and a new trial, and a new verdict, upon the issues of fact made by the pleadings. The writ of error is a proceeding instituted to obtain a *new trial* of the case, on the

ground of error in the record, or in the rulings or instructions of the court on the trial, made part of the record by the bill of exceptions. It impeaches the verdict, as well as the judgment.

We contend that after a *case on error* for *this* court has been regularly made up, by formal exceptions to the rulings and instructions of the court below, duly taken and sealed, at the trial, before verdict, and under those rulings and instructions, the jury has rendered a verdict against the defendant, for a sum sufficient to give this court jurisdiction of the case on writ of error, the defendant cannot be deprived of his right to a review of the decisions of the court below, and to a new trial of the issues, if the rulings were erroneous, by the entry, against his protest, on motion of plaintiff, of a judgment for a less sum than the jurisdictional amount.

If the plaintiff's claim and the amount of the verdict, are sufficient to give this jurisdiction of the case, it will review any judgment that may be entered, under such circumstance, although it may be less than $5,000, on writ of error prosecuted by the defendant.

It would be monstrous if a plaintiff, who prosecutes a baseless claim for $10,000, and obtains, through errors committed by the court, a verdict for $6,000, can remit $1,000 of the verdict, and thereby deprive the defendant of his right to have the errors of the court below, on the trial, corrected by this court, and a new trial of the case, and a proper verdict and judgment upon the issues.

If the object of the plaintiff, in entering such a remission, is to defeat, if possible, the jurisdiction of the court, it is an attempted *fraud* on the rights of the defendant, which this court will not allow to be successful.

The Circuit Judge, in this case, no doubt, thought it his duty to allow the plaintiff below to remit a portion of the verdict, and enter judgment for the sum asked by him, but the learned Judge endeavored carefully to provide against any injury to the right of the defendant to a review of the

case, in this court, by refusing to grant the plaintiff's motion until after the bill of exceptions was duly settled.

The court will see clearly that the amount of the "matter in dispute," in this case, in this court, is ascertained and determined by the amount of the *verdict*, the whole of which is disputed by the plaintiff in error.

The count of error reaches back of the judgment to the errors of law committed by the court on the trial; and as the recovery against the defendant was for more than the jurisdictional sum, this court has power, under the statute, to correct those errors, and grant a new trial.

2. It is true that this Court has often said, that when the judgment is for the plaintiff, and for an amount less than the jurisdictional sum, the defendant cannot maintain a writ of error, but in all those cases the *verdict* was for less than the jurisdictional amount, and the judgment corresponded to the verdict. In no case has this Court ever said that the defendant below cannot prosecute a writ of error, where the *verdict* was for more than the jurisdictional sum, and the judgment was entered for less, on motion of the plaintiff.

It would appear clearly, on the contrary, from the opinion of Judge Story, in *Knapp* v. *Banks*, (2 How., 73), that the verdict, as well as the judgment, must be for less than the jurisdictional sum, to defeat the jurisdiction of this Court.

Judge Story, in that case, said: "If a *verdict* is given againt the defendant for a less sum than two thousand dollars, and *judgment* passes against him *accordingly*, *there*, it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which judgment is given; and consequently he is not entitled to any writ of error."

The rule here announced is, that the verdict must be for less than the jurisdictional amount, and the judgment must have been rendered *accordingly*, to deprive this Court of jurisdiction to review the judgment.

We have called attention to the fact, that there is nothing in the Act of Congress which expressly makes the

amount of the judgment the measure of the sum or value in controversy, in cases where the defendant prosecutes in error. It is the sum or value of the "*matter in* dispute" which determines the jurisdiction. The general rule which prevails that the amount in controversy as to the defendant, is fixed by the judgment, grew up, as Chief Justice Marshall states, under the "silent practice of the Court." (*Thornton* v. *Bank*, 7 Peters, 33.)

The doctrine, in the early days of this court, was, that the jurisdiction of the court depended, as to both parties, upon the amount claimed in the Circuit Court by the plaintiff. This was decided in the case of *Nelson* v. *Daniel*, (3 Dallas, 401,) where Chief Justice Ellsworth, who drafted the Judiciary Act of 1789, gave an extended opinion on the subject. He said: "to ascertain the matter in dispute, we must recur to the foundation of the original controversy—to the matter in dispute when the action was instituted. The construction which is thus given, not only comports with every word in the law, but enables us to avoid an inconvenience, which would otherwise affect the impartial administration of justice. For if the sum, or value, found by a verdict, was considered as the rule to ascertain the magnitude of the matters in dispute, then, whenever less than $2,000 was found, a defendant could have no relief against the most erroneous and injurious judgment, though the plaintiff would have a right to a removal and revision of the cause; the demand is alone to govern him, being for more than $2,000. It is not to be presumed that the Legislature intended to give any party such an advantage over his antagonist."

This seems to have been the law of the court until the decision in *Wise and Lyon* v. *The Columbian Turnpike Company*, (7 Cranch, 276,) adopted a contrary rule. That decision was followed by the court in *Thornton* v. *Bank of Washington*, (7 Pet. 33,) because "the silent practice of the court had conformed to it," and but for that practice, Chief Justice Marshall said the court would have been much in-

clined to adhere to the doctrine of Chief Justice Ellsworth in *Nelson* v. *Daniel*.

We submit that the rule by which the court recurs to the amount of the judgment, to determine, as to the defendant below, the value in controversy, is not to be extended to the injury or prejudice of that party; and that where the verdict is for an amount larger than the jurisdictional sum, the court has jurisdiction of the case without regard to the amount of the judgment.

Third.

The motion to dismiss this writ of error should be overruled.

J. Hubley Ashton,
James Thomson,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1877.

No. 633.

ALEXANDER A. THOMPSON *v.* BENJAMIN F. BUTLER.

BRIEF OF DEFENDANT IN ERROR

ON MOTION TO DISMISS.

The record shows that the judgment, which it is sought to re-examine on this writ of error, is a judgment of the Circuit Court of the United States for five thousand dollars, rendered since the first day of May, 1875, in favor of the plaintiff in a civil action, brought in the Superior Court of the Commonwealth of Massachusetts, and removed thence into said Circuit Court, and that the plaintiff in error was the defendant in said Circuit Court.

Under the Revised Statutes of the United States, § 691, as amended by the Act of February 16, 1875, § 3, 18 Stat. 316, this Court has not jurisdiction to re-examine judgments of Circuit Courts, rendered since May 1, 1875, in such actions, unless the matter in dispute shall exceed the sum of five thousand dollars exclusive of all costs.

Yznaga del Valle v. *Harrison*, 93 U. S. 233.

It is settled that when the defendant in the Circuit Court prosecutes the writ of error, as in the case at bar, the matter in dispute, or the amount in controversy, is fixed by the judgment, and the judgment in the case at bar, being for five thousand dollars, does not exceed five thousand dollars, and cannot therefore be re-examined in this Court.

Walker v. *United States*, 4 Wall. 163.

If it be argued, however, that at the time the rulings and instructions stated and complained of in the bill of exceptions were made, or given, or refused, the amount in controversy exceeded five

thousand dollars, because the plaintiff was then seeking to obtain a verdict for a greater amount, the obvious answer is, that this argument would warrant a re-examination in this Court, at the instance of the defendant in the Circuit Court, of any judgment rendered against him in that Court for any amount, however small, provided only the plaintiff in the Circuit Court sought to obtain the verdict of a jury for more than five thousand dollars, because, in theory of law, all bills of exceptions are signed and sealed, as it appears by the record was done in this case, before the verdict of the jury is rendered. Such a rule is plainly inconsistent with the decision in *Walker* v. *United States* above cited, and by such a rule the statute of February 16, 1875, would be robbed of a great part of the operation which was expected from it.

This Court is excluded from any inquiry as to why the judgment of the Circuit Court does not exceed five thousand dollars, or why it is for just five thousand dollars, because any such inquiry would be in effect to re-examine the judgment of a Circuit Court, in a case in which the laws of the United States, as has been already shown, do not confer on this Court jurisdiction to do so.

G. A. SOMERBY,
L. S. DABNEY,
for defendant in error.